MOTION FILED DEC 31 1952

IN THE

Supreme Court of the United States

October Term, 1950.

No. 5, Original.

STATE OF NEW JERSEY,

v. *Plaintiff,*

STATE OF NEW YORK and CITY OF NEW YORK,

Defendants.

COMMONWEALTH OF PENNSYLVANIA,

Intervenor.

MOTION FOR LEAVE TO FILE ANSWER TO INTERVENING PETITION OF CITY OF PHILADELPHIA, ANSWER ON BEHALF OF COMMONWEALTH OF PENNSYLVANIA, INTERVENOR, AND BRIEF IN SUPPORT THEREOF.

COMMONWEALTH OF PENNSYLVANIA,
Intervenor

ROBERT E. WOODSIDE,
Attorney General of Pennsylvania,
GEORGE G. CHANDLER,
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COMMONWEALTH OF PENNSYLVANIA,
Intervenor.

MOTION FOR LEAVE TO FILE ANSWER TO INTERVENING PETITION OF CITY OF PHILADELPHIA.

Now comes the Commonwealth of Pennsylvania, by its Attorney General, and respectfully moves this Honorable Court for leave to present and file its answer in opposition to the intervening petition of City of Philadelphia.

COMMONWEALTH OF PENNSYLVANIA,
Intervenor.

By

ROBERT E. WOODSIDE,
Attorney General of Pennsylvania.
GEORGE G. CHANDLER,
BERNARD G. SEGAL,
Special Counsel and Solicitors for the Commonwealth of Pennsylvania.

Of Counsel:

WM. A. SCHNADER,
HARRY F. STAMBAUGH,
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COMMONWEALTH OF PENNSYLVANIA,

Intervenor.

ANSWER ON BEHALF OF COMMONWEALTH OF PENNSYLVANIA, INTERVENOR, TO INTERVENING PETITION OF THE CITY OF PHILADELPHIA.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The answer of the Commonwealth of Pennsylvania, by its Attorney General, respectfully represents:

1. The Commonwealth of Pennsylvania admits all of the averments of paragraph one of the petition to intervene. In further answer, this Court on January 6th, 1930 granted leave to the Commonwealth as *parens patriae* to intervene in the original action brought by the State of New Jersey against the State of New York and the City of New York, as of October Term, 1930, Original No. 16, in order to protect the rights and interests of all of its citizens residing in the basin and watershed area of the Delaware River and its tributaries and depending upon such waters for their

present and reasonable future requirements for domestic, municipal, sanitary, industrial and other purposes. In pursuance thereof the Commonwealth in such capacity participated in all the proceedings and hearings in that action and offered such evidence as it considered necessary for the protection of the rights and interests of its citizens.

2. Intervenor is without information sufficient to enable it to admit or deny the reason stated in paragraph 2 of the petition to intervene as to why the City of Philadelphia was not a party to the original proceedings in this Court (October Term, 1930, Original No. 16); but avers that the Commonwealth in its sovereign capacity as *parens patriae* was and now is the sole proper party to represent its citizens in that original proceeding, as well as in the present original proceeding (October Term, 1950, Original No. 5), which exclusive prerogative has been recognized by this Court. In further answer intervenor avers that according to the 1950 United States census the population of its citizens residing in the watershed area of the Delaware River and its tributaries and depending upon the waters thereof was 4,061,420, of which total the inhabitants of the City of Philadelphia number 2,071,605; that the rights and interests of all Pennsylvania citizens in the waters of the Delaware River and its tributaries have been and now are being protected by the Commonwealth as *parens patriae;* and that the broad powers of home rule granted the City of Philadelphia in 1949 do not abrogate or in any manner qualify the sovereign prerogative of the Commonwealth as such *parens patriae.*

3-14. Intervenor admits the averments of paragraphs 3-14, both inclusive, of the intervening petition.

15. Further answering, intervenor avers that the proposed intervention by the City of Philadelphia in this original action is unnecessary and can serve no useful purpose because with the leave of this Court the rights and interests of all Pennsylvania citizens, including those of Philadel-

phia, have heretofore been, are now being, and will hereafter be fully represented and protected by the Commonwealth in its sovereign capacity as *parens patriae;* and that such intervention would not only be in derogation of the sovereignty and prerogatives of the Commonwealth, but would also be subversive of the right and duty of its Attorney General to represent the Commonwealth in all actions and to conduct any litigation on its behalf and on behalf of its citizens.

16. Further answering, intervenor avers that the answer proposed to be filed by the City of Philadelphia, if its petition for intervention be granted, raises no questions which have not been raised by intervenor in its separate answer heretofore filed.

17. Further answering, intervenor avers that if the City of Philadelphia were permitted by this Court to intervene, this Court could not consistently refuse similar applications from every other Pennsylvania and New Jersey political subdivision which borders on the Delaware River, as well as from corporations and individuals owning properties along the river and feeling that they would be particularly damaged if the petition of the City of New York were granted. Interventions by a substantial number of political subdivisions, corporations and individuals would render this proceeding unnecessarily cumbersome and expensive.

18. Further answering, intervenor avers that it has, from the inception of this proceeding, kept the City of Philadelphia informed concerning its plans for representing the interests of all citizens of Pennsylvania and has invited the appropriate officials of the City to cooperate with it.

19. Further answering, intervenor avers that the proposed intervention by the City of Philadelphia would be in violation of the Eleventh Amendment to the Constitution of the United States.

WHEREFORE, the Commonwealth of Pennsylvania respectfully prays this Court to deny the intervening petition of the City of Philadelphia.

Respectfully submitted,

COMMONWEALTH OF PENNSYLVANIA,
Intervenor.

By

ROBERT E. WOODSIDE,
Attorney General of Pennsylvania.
GEORGE G. CHANDLER,
BERNARD G. SEGAL,
Special Counsel and Solicitors for the Commonwealth of Pennsylvania.

Of Counsel:

WM. A. SCHNADER,
HARRY F. STAMBAUGH,
Special Counsel:

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF DAUPHIN } *ss.:*

ROBERT E. WOODSIDE, being first duly sworn according to law, deposes and says that he is the Attorney General for the Commonwealth of Pennsylvania; that he is duly authorized to make this affidavit on its behalf; that he has read the above answer; that the averments thereof so far as they are within his personal knowledge are true and correct, and that insofar as they are upon information and belief, he believes them to be true and correct.

ROBERT E. WOODSIDE

Sworn to and subscribed before me this 30th day of December, A. D. 1952.

LUCILLE A. STROUP,
Notary Public.

(Seal)

My Commission Expires March 5, 1955.

BRIEF IN SUPPORT OF ANSWER.

A. The Commonwealth of Pennsylvania Was Properly Permitted by This Court to Intervene as *Parens Patriae* and in That Capacity Has Protected and Will Continue to Protect the Interests of All of Its Citizens, Including the Intervening Petitioner, in the Waters of the Delaware River.

The decisions of this Court have uniformly declared that a State in its sovereign capacity as *parens patriae* is the proper party to represent its citizens in original suits between States, where the interests and property rights of its citizens are menaced by and require protection against the acts of a sister State and its inhabitants.

A leading decision in point is **North Dakota v. Minnesota**, 263 U. S. 365 (1923). That was an original suit to enjoin a system of drainage ditches constructed by the State of Minnesota, and for money damages to North Dakota farmers caused by overflows of the Bois de Sioux River, attributed by the plaintiff to the construction and operation of the ditches. In dismissing the bill without prejudice, Chief Justice Taft discussed the propriety of original suits brought by a State in its capacity as *parens patriae* to protect and safeguard the rights of its citizens as follows (pp. 372-74):

> "The jurisdiction and procedure of this Court in controversies between States of the Union differ from those which it pursues in suits between private parties. This grows out of the history of the creation of the power, in that it was conferred by the Constitution as a substitute for the diplomatic settlement of controversies between sovereigns and a possible resort to force. **The jurisdiction is therefore limited generally to disputes which, between States entirely independent, might be properly the subject of diplomatic adjustment.**

They must be suits 'by a State for an injury to it in its capacity of quasi-sovereign. In that capacity the State has an interest independent of and behind the titles of citizens, in all the earth and air within its domain.' * 'When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests; and the alternative to force is a suit in this court.' *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 237. In accord with this principle, this Court has entertained a suit by one State to enjoin the deposit by another State, in an interstate stream, of drainage containing noxious typhoid germs because dangerous to the health of the inhabitants of the former. *Missouri v. Illinois,* 180 U. S. 208, 241; s. c. 200 U. S. 496, 518. It has assumed jurisdiction to hear and determine a bill to restrain one State from a diversion of water from an interstate stream by which the lands of a State lower down on the stream may be deprived of the use of its water for irrigation in alleged violation of the right of the lower State. *Kansas v. Colorado,* 185 U. S. 125, 141, 143; s. c. 206 U. S. 46, 95. In *Wyoming v. Colorado,* 259 U. S. 419, 464, it granted relief to one State to prevent another from diverting water from an interstate stream to the injury of rights acquired through prior appropriations of the water by land owners of the former State under the doctrine of appropriation recognized and administered in both States. In *Georgia v. Tennessee Copper Co., supra,* it enjoined in behalf of a State the generation and spread of noxious fumes by a factory in another State because it was a public nuisance

* Wherever in this brief, **bold face** type is used, the emphasis is ours.

in destroying crops and forests within the borders of the former State. In *Pennsylvania v. West Virginia*, 262 U. S. 553, 592, at the suit of one State, this Court has enjoined another State from enforcing its statute by which the flow of natural gas in interstate commerce from the latter State was forbidden, to the threatened loss and suffering of the people of the suing State who had become dependent for comfort and health upon its use. It needs no argument, in the light of these authorities, to reach the conclusion that, where one State by a change in its method of draining water from lands within its border, increases the flow into an interstate stream, so that its natural capacity is greatly exceeded and the water is thrown upon the farms of another State, the latter State has such an interest as quasi-sovereign in the comfort, health and prosperity of its farm owners that resort may be had to this Court for relief. It is the creation of a public nuisance of simple type for which a State may properly ask an injunction."

The prerogative of a sovereign State as *parens patriae* to represent all its citizens and protect their interests and property rights against the acts of a sister State and its inhabitants, as declared in the **North Dakota** case, has been recognized and upheld by this Court in the later cases of **Wisconsin v. Illinois**, 278 U. S. 367 (1929) and 281 U. S. 179 (1930) at page 200; **State of New Jersey v. New York**, 283 U. S. 336 (1931) at pages 342-43; **State of Wyoming v. Colorado**, 298 U. S. 573 (1936) at page 585; and **Colorado v. Kansas**, 320 U. S. 383 (1943) at pages 393-94.

In clear recognition of the right and duty of a State as *parens patriae* to promote and defend the welfare and interests of its citizens, this Court on January 6, 1930, granted leave to the Commonwealth of Pennsylvania to intervene in that capacity in the original proceedings brought by the State of New Jersey against the State of New York

and City of New York as of October Term, 1930, Original No. 16, in order that it might protect and further the rights and interests of all of its citizens, who reside in the basin and watershed area of the Delaware River and its several Pennsylvania tributaries and depend upon this river and its tributaries for their present and reasonable future requirements of water for domestic, municipal, sanitary, industrial and other purposes.

Pursuant to that leave of court, the Commonwealth of Pennsylvania was represented at the 1930 hearings before the Special Master by the Attorney General and his staff of counsel and engineers; and during the two weeks alloted for the presentation of Pennsylvania's case before the Special Master, extensive testimony was adduced in support of a Pennsylvania plan of impounding and release, which was formulated by the Pennsylvania engineers after exhaustive study and permitted all three States to take water from the tributaries of the upper Delaware River for domestic and municipal potation without causing any material damage to any other interests in the waters of that river. This plan is in furtherance of the avowed policy of the Commonwealth that the water resources of the Delaware River and its tributaries shall be developed through regulated control of storage and release of waters from impounding dams to the end that there may be the maximum conservation and utilization of these water resources for domestic and municipal water supply and sanitation, industrial water supply, and kindred uses.

When the City of New York filed its pending petition to modify the decree of this Court, dated May 25, 1931, the Commonwealth as *parens patriae* and in pursuance of the leave granted by this Court on January 6, 1930, filed its separate answer in protection and furtherance of the rights and interests of all its citizens and has since continued to act in that capacity in the preliminary informal proceedings which have been held before the Special Master, the Honorable Kurt F. Panzer. And the Commonwealth will

continue so to act. It will present whatever supplemental evidence it deems necessary for the protection of all its citizens.

The Commonwealth of Pennsylvania as *parens patriae* has in no wise neglected or overlooked the interests of the City of Philadelphia. On the contrary it has fostered and protected those interests along with the interests of all of its other citizens in the waters of the Delaware River.

Should the present petitioner be granted leave to intervene, then any other interested Pennsylvania citizen or group of citizens or municipality would likewise be entitled to intervene in the present proceedings. If such unlimited intervention were to be permitted, the inevitable result would be the ousting of the duly constituted law officer of the State, the Attorney General, who has always been heretofore responsible for the conduct of State litigation involving the welfare of its citizenry at large. With the highly divergent interests necessarily involved in any interstate water litigation, unrestricted intervention will bring about confusion worse confounded and will destroy an important prerogative of State sovereignty.

B. The Proposed Intervention Would Violate the Eleventh Amendment to the Constitution of the United States.

Although a citizen of one State could originally under the United States Constitution sue another State for an alleged wrong, that right was taken from the individual citizen by the Eleventh Amendment, which is as follows:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State."

In **New Hampshire v. Louisiana: New York v. Louisiana,** 108 U. S. 76 (1883), original actions were brought by New Hampshire and New York to collect bonds and cou-

pons of the defendant State, Louisiana, which were respectively held and owned by New Hampshire and New York citizens. Both States had passed enabling legislation for the bringing of the actions. In holding that the actions violated the Eleventh Amendment because they were in effect actions by the citizens of New Hampshire and New York, even though brought in the names of the States, and should therefore be dismissed, this Court, speaking through Chief Justice Waite said (pp. 88-89, 91):

> "Under the operation of this amendment the actual owners of the bonds and coupons held by New Hampshire and New York are precluded from prosecuting these suits in their own names. The real question, therefore, is whether they can sue in the name of their respective States, after getting the consent of the State, or, to put it in another way, whether a State can allow the use of its name in such a suit for the benefit of one of its citizens.
>
> "**The language of the amendment is, in effect, that the judicial power of the United States shall not extend to any suit commenced or prosecuted by citizens of one State against another State.** No one can look at the pleadings and testimony in these cases without being satisfied, beyond all doubt, that they were in legal effect commenced, and are now prosecuted, solely by the owners of the bonds and coupons. . . .
>
> * * * * *
>
> ". . . **The evident purpose of the amendment, so promptly proposed and finally adopted, was to prohibit all suits against a State by or for citizens of other States, or aliens, without the consent of the State to be sued, and, in our opinion, one State cannot create a controversy with another State, within the meaning of that term as used in the judicial clauses of the Constitution, by assuming the prosecution of debts owing by the other State to its citizens.** Such being the case we

are satisfied that we are prohibited, both by the letter and the spirit of the Constitution, from entertaining these suits, and the bill in each case is dismissed."

The rule laid down and applied in the **New Hampshire** and **New York** cases, that the judicial power of the United States does not extend to an action brought by a citizen of one State against another State has never been overruled or qualified. The following cases have cited with approval the **New Hampshire** and **New York** cases and declared that the Eleventh Amendment bars a suit against a State by a citizen of another State:

Louisiana v. Texas, 176 U. S. 1 (1900) at pages 16-18

Missouri v. Illinois, 180 U. S. 208 (1901) at page 241

Kansas v. Colorado, 185 U. S. 125 (1902) at page 142

Kansas v. Colorado, 206 U. S. 46 (1907) at pages 95, 96

Georgia v. Tennessee Copper Co., 206 U. S. 230 (1907) at page 237

Massachusetts v. Mellon, 262 U. S. 447 (1923) at page 485

Florida v. Mellon, 273 U. S. 12 (1927) at page 18

Oklahoma v. Johnson, 304 U. S. 387 (1938) at pages 392-96

Jones, Governor v. Bowles, Price Adr., 322 U. S. 707 (1944) at page 708

Ford Motors Co. v. Dept. Treas. Ind., 323 U. S. 459 (1945) at page 464

Georgia v. Penna. R. R. Co., 324 U. S. 439 (1945) at page 464

A search of the decisions of this Court discloses many cases in addition to the present case where one State in its sovereign capacity as *parens patriae* has sued either a citizen of another State or else such a citizen and his parent

State to enjoin acts that were injurious to the rights of the plaintiff State and its citizens, such as **Georgia v. Tennessee Copper Co.**, 206 U. S. 230 (1907) and **State of Wisconsin v. State of Illinois and Sanitary District of Chicago**, 278 U. S. 367 (1929) and 281 U. S. 179 (1930). However, we have not found any case in which a citizen of one State was the plaintiff, either singly or in conjunction with his parent State, and another State was the defendant, or in which such a citizen was permitted to intervene for the purpose of protecting his rights in an action brought by one State against another State.

An analogous case denying intervention because it would in effect permit a citizen of one State to sue the United States without its consent is **United States v. Great Northern Railway Co.**, 32 Fed. Supp. 651 (1940). This was an action by the United States against the defendant Railroad to enjoin the drilling for oil, gas or minerals on public lands over which the Railroad had a "right-of-way". The patentee of the land sought to intervene in order to establish a right to the minerals. In denying the application for intervention, District Judge Pray ruled (pp. 655-56):

> "The application to intervene was considered at the hearing on the motion for judgment on the pleadings, and was allowed subject to further consideration of the objections interposed by plaintiff. . . . Before passing to a consideration of the merits of intervener's cause, the arguments in briefs of counsel for both sides in respect to the right of the trustee to intervene must be given further attention. **The first and perhaps the principal objection to intervention is the claim made by the trustee to ownership of the minerals in question, at the same time seeking a judgment or decree against the United States in recognition of such claim. Here the objection becomes two-fold, as it appears to be not only a substitution of the intervener for the defendant but likewise a suit against the United States without its consent, accomplished by indirection by alleging a**

claim of ownership against the United States in a cross bill. Although the intervener's complaint presents the appearance of being a suit against the defendant railway company, it nevertheless asks for a decree which if rendered would result in quieting title to the property in the trustee and in making an adverse ruling against the government. There could be no distinction between suits against the United States directly and suits against its property. Whoever sues the United States must bring his case within the authority of some act of Congress. Belknap v. Schild, 161 U. S. 10, 16, 17, 16 S. Ct. 443, 40 L. Ed. 599; Stanley v. Schwalby, 147 U. S. 508, 512, 13 S. Ct. 418, 37 L. Ed. 259.

"Again, **the Supreme Court has held that the question whether the United States is a party to a controversy is not determined by the merely nominal party on the record but by the question of the effect of the judgment or decree which can be entered.** Minnesota v. Hitchcock, 185 U. S. 373, 385, 387, 22 S. Ct. 650, 46 L. Ed. 954. On this subject the court again held in Lynch v. United States, 292 U. S. 571, 582, 54 S. Ct. 840, 845, 78 L. Ed. 1434; that: **'The Sovereign's immunity from suit exists whatever the character of the proceeding or the source of the right sought to be enforced.** It applies alike to causes of action arising under acts of Congress.' Mr. Chief Justice Taft held in Nassau Smelting & Refining Works, Ltd. v. United States, 266 U. S. 101, 106, 45 S. Ct. 25, 69 L. Ed. 190, in respect to suing the United States: 'The objection to a suit against the United States is fundamental, whether it be in the form of an original action, or a set-off, or a counterclaim. Jurisdiction in either case does not exist, unless there is specific congressional authority for it.'

"If a judgment were allowed under a plea of set-off, that would be in effect permitting the United States to be sued. Reeside v. Walker, 11 How. 272, 52 U. S.

272, 289, 290, 13 L. Ed. 693. Many other decisions and rules on the subject of intervention are to be found, but the foregoing appear to be sufficient for a determination of the issue here."

The case was appealed to the 9th Circuit Court of Appeals on other grounds and was affirmed at **119 F. (2d) 821 (1941)**. The appellate decision was modified and affirmed by this Court at **315 U. S. 262 (1942)**.

The analogy between the **Great Northern Railway** case and Philadelphia's petition for leave to intervene is apparent. In both cases the would-be intervenor is barred under the Eleventh Amendment from suing in his own right the sovereign without the latter's consent. In both cases avoidance of the bar of the Eleventh Amendment is sought through the procedural medium of intervention. Such intervention should be denied where, as there and here, the ultimate effect thereof is to allow a citizen of a sovereign State to obtain injunctive relief against another sovereign without the latter's consent.

When this original action was instituted (October Term 1930, Original No. 16) it at once became imperative that the Commonwealth of Pennsylvania as *parens patriae* should intervene in order to assert and protect the rights and interests of Philadelphia and Eastern Pennsylvania in the waters of the Delaware River and its Pennsylvania tributaries as a present and future source of water supply. The Commonwealth could under no circumstance intervene as party plaintiff because the basic principle of the New Jersey bill (i. e., the common law rule of riparian rights) was subversive of the right of Philadelphia and Eastern Pennsylvania to continue their use and development of the Delaware River and its Pennsylvania tributaries as a present and future source of water supply. It was against the interest of the Commonwealth to intervene as party defendant because if New York was granted leave by this Court to divert water from the Delaware River for

water supply purposes under the doctrine of fair and equitable apportionment, it then became of the utmost importance that such a diversion should be so conditioned as to preclude New York from presently diverting more than its fair and equitable share in the waters of that River. Obviously, a diversion at will and without restriction from the New York tributaries of the upper Delaware River might deprive Philadelphia and Eastern Pennsylvania not only of their fair and equitable share of water from the Delaware River and its Pennsylvania tributaries, but also their reasonable use thereof.

Therefore, the Commonwealth of Pennsylvania as *parens patriae* representing the interests and welfare of all its citizens resident in the basin and watershed area of the Delaware River and its Pennsylvania tributaries and dependent upon the waters of that River and those tributaries for their present and future needs, presented its petition to this Court for leave to intervene *pro interesse suo.*

The petition was vigorously opposed by New Jersey and New York, which endeavored to compel Pennsylvania to intervene either as party plaintiff or defendant; but this Court on January 6, 1930, granted the prayer of the petition, provided the intervenor filed a statement of interest and the relief, if any, desired.

Since January 6, 1930, the role of Pennsylvania as intervenor has always been *pro interesse suo* and not that of plaintiff or defendant. In such role it has at all stages of the present litigation taken such affirmative action against both New Jersey, the plaintiff, and New York, the defendant, as the particular circumstances required. When the City of New York filed its petition to amend the decree of this Court dated May 25, 1931, the Commonwealth of Pennsylvania, in its capacity as intervenor *pro interesse suo,* filed its separate answer requesting this Court to dismiss the petition.

By its answer the Commonwealth thus seeks affirmative relief against the State and City of New York who are

requesting an increase in their fair and equitable share of water from the Delaware River and its tributaries from the allowed 440 million gallons daily to 800 million gallons daily.

If the City of Philadelphia were permitted to intervene, then according to its petition it would not only be seeking injunctive relief against the proposed New York diversion of the same nature as that which the Commonwealth as *parens patriae* has already invoked on behalf of all citizens residing within the watershed area of the Delaware River and its tributaries, but it would also as an intervenor in its own right be actually maintaining an affirmative action against the sovereign State of New York without its consent in violation of the Eleventh Amendment to the Constitution of the United States.

Respectfully submitted,

ROBERT E. WOODSIDE,
Attorney General of Pennsylvania.
GEORGE G. CHANDLER,
BERNARD G. SEGAL,
Special Counsel and Solicitors for the Commonwealth of Pennsylvania.

Of Counsel:

WM. A. SCHNADER,
HARRY F. STAMBAUGH,
Special Counsel.

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STATE OF NEW JERSEY,
Complainant,

vs.

STATE OF NEW YORK and CITY OF NEW YORK,
Defendants,

COMMONWEALTH OF PENNSYLVANIA,
Intervenor.

MOTION OF THE COMMONWEALTH OF PENNSYLVANIA FOR LEAVE TO FILE AMENDED ANSWER AND AMENDED ANSWER.

ROBERT E. WOODSIDE,
Attorney General of Pennsylvania,
GEORGE G. CHANDLER,
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